

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL TERRELL HARDY, } NO. CV 11-3304-RGK (AGR)
Petitioner, }
v. } ORDER TO SHOW CAUSE
MIKE MARTEL, Warden, }

ORDER TO SHOW CAUSE

On April 19, 2011, Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody (“Petition”) pursuant to 28 U.S.C. § 2254. For the reasons discussed below, it appears that the one-year statute of limitations has expired.

The Court, therefore, orders Petitioner to show cause, on or before **May 23, 2011**, why this Court should not recommend dismissal with prejudice based on expiration of the one-year statute of limitations.

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1. 1.

2. **PROCEDURAL BACKGROUND**

3. The Petition indicates that on April 19, 1998, Petitioner was convicted of
4. grand theft pursuant to Cal. Penal Code § 487. (Petition at 2.) Petitioner was
5. sentenced to 25 years to life. (*Id.*) On August 16, 1999, the California Court of
6. Appeal affirmed the judgment with modifications. (*Id.* at 3; Case No. B120984,
7. online docket.) On November 10, 1999, the California Supreme Court denied the
8. petition for review. *People v. Hardy*, 1999 Cal. LEXIS 7854 (1999).

9. The Petition states that, on December 14, 2000, the Los Angeles Superior
10. Court denied a petition for writ of habeas corpus. (Petition at 3-4.) On December
11. 29, 2000, the California Court of Appeal denied a petition for writ of habeas
12. corpus. (*Id.* at 4.)

13. On February 8, 2010, the Los Angeles County Superior Court denied a
14. petition for writ of habeas corpus. (Attachment to Petition.) Although not
15. mentioned in the Petition, the online docket indicates that Petitioner filed a
16. petition for writ of habeas corpus in the California Court of Appeal on April 2,
17. 2010. On April 13, 2010, the petition was denied. (Case No. B223430, online
18. docket.) On April 29, 2010, Petitioner filed a petition for writ of habeas corpus in
19. the California Supreme Court. On November 10, 2010, the California Supreme
20. Court denied the petition. (Attachment to Petition; Case No. S182280, online
21. docket.)

22. On April 6, 2011, Petitioner signed and mailed the Petition to this Court.
23. (Petition at 7.)

24. 2.

25. **STATUTE OF LIMITATIONS**

26. The Petition was filed after enactment of the Antiterrorism and Effective
27. Death Penalty Act of 1996 (“AEDPA”). Therefore, the Court applies the AEDPA
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1 in reviewing the petition. *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059,
 2 138 L. Ed. 2d 481 (1997).

3 The AEDPA contains a one-year statute of limitations for a petition for writ
 4 of habeas corpus filed in federal court by a person in custody pursuant to a
 5 judgment of a state court. 28 U.S.C. § 2244(d)(1). The one-year period starts
 6 running on the latest of either the date when a conviction becomes final under 28
 7 U.S.C. § 2244(d)(1)(A) or on a date set in § 2244(d)(1)(B)-(D).

8 a. **The Date on Which Conviction Became Final**

9 The California Supreme Court denied the petition for review on November
 10, 1999. *Hardy*, 1999 Cal. LEXIS 7854. His conviction became final ninety days
 11 later on February 8, 2000. *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999).
 12 The statute of limitations expired one year later on February 8, 2001. Petitioner
 13 signed and mailed his federal habeas petition on April 6, 2011, over 10 years
 14 later. (Petition at 7.) The Petition is time-barred unless the statute of limitations
 15 was tolled.

16 b. **Statutory Tolling**

17 The statute of limitations is tolled during the time “a properly filed
 18 application for State post-conviction or other collateral review with respect to the
 19 pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). However, the
 20 statute of limitations is not tolled during the interval between the time a conviction
 21 becomes final on direct review and the time the first state habeas petition is filed
 22 because there is no case “pending” during that interval. *Thorson v. Palmer*, 479
 23 F.3d 643, 646 (9th Cir. 2007).

24 Petitioner does not state when he first filed a state habeas petition.
 25 However, on December 14, 2000, the Los Angeles Superior Court denied a
 26 petition for writ of habeas corpus. (Petition at 3-4.) On December 29, 2000, the
 27 California Court of Appeal denied a petition for writ of habeas corpus. (*Id.* at 4.)
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1 Accordingly, even assuming the statute of limitations was tolled for the
 2 entire period from February 8, 2000 through December 29, 2000, the statute of
 3 limitations expired one year later on December 29, 2001. The Petition would
 4 remain barred by the statute of limitations.

5 On February 8, 2010, the Los Angeles County Superior Court denied a
 6 petition for writ of habeas corpus. (Attachment to Petition.) A state habeas
 7 petition filed after the limitations period has expired does not toll or revive the
 8 expired limitations period. *Welch v. Carey*, 350 F.3d 1079, 1081-84 (9th Cir.
 9 2003).

10 c. **Equitable Tolling**

11 “[T]he timeliness provision in the federal habeas corpus statute is subject to
 12 equitable tolling.” *Holland v. Florida*, 130 S. Ct. 2549, 2554, 177 L. Ed. 2d 130
 13 (2010). “[A] ‘petitioner’ is ‘entitled equitable tolling’ only if he shows ‘(1) that he
 14 has been pursuing his rights diligently, and (2) that some extraordinary
 15 circumstance stood in his way’ and prevented timely filing.” *Id.* at 2562 (quoting
 16 *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669
 17 (2005)). “The diligence required for equitable tolling purposes is “reasonable
 18 diligence,” not “maximum feasible diligence.” *Id.* at 2565 (citations and quotation
 19 marks omitted). The extraordinary circumstances must have been the cause of
 20 an untimely filing. *Pace*, 544 U.S. at 418. “[E]quitable tolling is available for this
 21 reason only when “extraordinary circumstances beyond a prisoner’s control
 22 make it *impossible* to file a petition on time” and “the extraordinary
 23 circumstances” were the *cause* of [the prisoner’s] untimeliness.”” *Bills v. Clark*,
 24 628 F.3d 1092, 1097 (9th Cir. 2010) (citations omitted; emphasis in original).

25 The Petition does not provide any basis for equitable tolling.

26 d. **The Cunningham Decision**

27 It appears Petitioner may argue that Ground One is not barred by the
 28 statute of limitations because it is based on the United States Supreme Court’s

1 decision on January 22, 2007 in *Cunningham v. California*, 549 U.S. 270, 275,
 2 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007), and the California Supreme Court's
 3 decision in *In re Gomez*, which held that "Cunningham applies retroactively to any
 4 case in which the judgment was not final at the time the decision in *Blakely* was
 5 issued."¹ 45 Cal. 4th 650, 660, 88 Cal. Rptr. 3d 177 (2009).

6 The statute of limitations may start running on "the date on which the
 7 constitutional right asserted was initially recognized by the Supreme Court, if the
 8 right has been newly recognized by the Supreme Court and made retroactively
 9 applicable to cases on collateral review." 28 U.S.C. § 2244(d)(1)(C); see *Dodd v.*
 10 *United States*, 545 U.S. 353, 357, 359, 125 S. Ct. 2478, 162 L. Ed. 2d 343
 11 (2005). In *Dodd*, the Supreme Court addressed a provision in 28 U.S.C. § 2255²
 12 that is materially identical to 28 U.S.C. § 2244(d)(1)(C):

13 The limitation period shall run from the latest of -

14 * * *

15 (3) the date on which the right asserted was initially recognized by
 16 the Supreme Court, if that right has been newly recognized by the
 17 Supreme Court and made retroactively applicable to cases on
 18 collateral review.

19 The court held that the statute starts running on the date the court recognizes the
 20 right, not on the date the court makes it retroactively applicable. *Id.* at 358.³

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23 ¹ The Supreme Court decided *Blakely v. Washington* on June 24, 2004,
 24 after Petitioner's conviction became final on February 8, 2000. 542 U.S. 296, 124
 25 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The Ninth Circuit held *Blakely* announced
 26 a new rule which does not apply retroactively to a conviction that was final before
 27 *Blakely* was announced. *Schardt v. Payne*, 414 F.3d 1025, 1038 (9th Cir. 2005).

28 ² Under section 2255, a federal prisoner may challenge his or her
 29 sentence as unconstitutional.

30 ³ "Dodd is equally applicable to section 2244(d)(1)(C)." *Johnson v. Robert*,
 31 431 F.3d 992, 992-93 (7th Cir. 2005) (per curiam).

1 However, a petitioner “may take advantage of the date in the first clause of ¶ 6(3)
 2 only if the conditions in the second clause are met.” *Dodd*, 545 U.S. at 359.

3 The Supreme Court decided *Cunningham* on January 22, 2007. The
 4 Supreme Court has not recognized *Cunningham* as a new rule. The Ninth Circuit
 5 has held that *Cunningham* did not announce a new rule. *Butler v. Curry*, 528
 6 F.3d 624, 639 (9th Cir. 2008). The Ninth Circuit interpreted *Cunningham* as
 7 “simply appl[ying] the rule of *Blakely* to a distinct but closely analogous state
 8 sentencing scheme.” *Id.* at 636. The *Cunningham* decision does not provide an
 9 alternative start date for the statute of limitations under 28 U.S.C. §
 10 2244(d)(1)(C). Moreover, Petitioner did not file his petition within one year after
 11 the decision in *Cunningham*.

12 Nor can Petitioner rely on the California Supreme Court’s decision in *In re*
 13 *Gomez* on February 2, 2009. A decision of a state court cannot render a petition
 14 timely under 28 U.S.C. § 2244(d)(1)(C). Moreover, the Petition would be untimely
 15 even if § 2244(d)(1)(C) were applicable.

16 e. **The Date on Which Petitioner Knew or Should Have Known of**
 17 **the Breach – 28 U.S.C. § 2244(d)(1)(D)**

18 Ground Two of the Petition is based upon an alleged breach of a plea
 19 agreement. In the context of an alleged breach of a plea agreement, the one-
 20 year period begins running on the date the inmate was, or through the exercise of
 21 reasonable diligence, should have been aware of the breach (the factual
 22 predicate of his claim). *Murphy v. Espinoza*, 401 F. Supp. 2d 1048, 1052 (C.D.
 23 Cal. 2005); See *Perkins v. Curry*, 2010 U.S. Dist. LEXIS 118044, *16 (N.D. Cal.
 24 Oct. 25, 2010); *Daniels v. Kane*, 2006 WL 1305209, *1 (N.D. Cal. 2006) (statute
 25 of limitations begins to run on “the date a petitioner knew or should have known
 26 that a breach occurred”). Thus, the applicable statutory provision is §
 27 2244(d)(1)(D) (“the date on which the factual predicate of the claim or claims
 28 presented could have been discovered through the exercise of due diligence”).

1 Petitioner states that he entered into a plea agreement on March 25, 1994.
2 (Petition at 16.) According to Petitioner, as part of the plea agreement, his
3 conviction could be used to enhance a sentence for a future conviction, but only
4 up to one year. (*Id.*)

5 Petitioner further states that the trial judge in this case used the 1994
6 conviction as a prior strike, thereby lengthening his sentence by more than one
7 year under the Three Strikes Law. (*Id.*)

8 Accordingly, Petitioner was aware of the alleged breach of the 1994 plea
9 agreement no later than the sentencing in this case on April 19, 1998. This date
10 is *earlier* than the date on which the conviction became final. Therefore,
11 regardless of which date the Court uses, the Petition is time-barred.

12 **3.**

13 **ORDER TO SHOW CAUSE**

14 IT IS THEREFORE ORDERED that, on or before **May 23, 2011**, Petitioner
15 shall show cause, if there be any, why this Court should not recommend
16 dismissal with prejudice of the Petition based on expiration of the one-year
17 statute of limitations. Petitioner's response must explain why the Petition is not
18 barred by the statute of limitations.

19 ***Petitioner is also advised that if he fails to timely respond to this***
20 ***Order to Show Cause, the Magistrate Judge will recommend that the***
21 ***District Court dismiss the Petition, with prejudice, based on expiration of***
22 ***the one-year statute of limitations.***

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24 DATED: April 22, 2011
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ALICIA G. ROSENBERG
United States Magistrate Judge